Supreme Court, U.S.
FILED
FEB 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-748

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ONE PARCEL OF LAND AND MARVIN J. GOLDMAN AND FRED BURKA, INDIVIDUALLY AND AS TRUSTEES, ETC.,
Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, A BODY CORPORATE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY MEMORANDUM

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1. WMATA, represented by the Solicitor General, does not deny that the question presented by the Petition is "important and recurring." (Pet. 10-12.) Its opposition to review is based exclusively on the contention that "the decision below is correct" (Br. Opp. 3). In so contending it perpetuates the lower courts' misunderstanding of *Berman* v. *Parker*, 348 U.S. 26, which is at the heart of the problem and which only this Court can correct.

According to respondent, the claim that an interest in land is being condemned for an improper purpose

> invites the court to rule that the public agency must be restricted, in condemning land for a valid public purpose, to limits the court deems appropriate. This is the inquiry that *Berman* v. *Parker* prohibits. (Br. Opp. 5)

On the contrary, the claim invites the court to rule only that the public agency is condemning land (or any interest therein) for a purpose within limits which *the Constitution* deems appropriate, namely, a "public use" within the meaning of the Fifth Amendment. *That* is an inquiry that the Constitution commands (see Pet. 12-13, 15-16; *cf. Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 163). And it is one which, far from prohibiting, *Berman* v. *Parker actually undertook;* what the Court said on this subject was that

> [t]he role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one. (348 U.S. at 32).

We fully agree that judicial review should be "extremely narrow," see Pet. 14-15; but this differs fundamentally from a holding that the issue of "public purpose" is nonjusticiable.

Berman also did not state, let alone decide, that the issue ceases to be justiciable whenever some portion of the taking is admittedly for a public purpose. For it has never been the law—although it is the precise result of the ruling below—that because the Government has a public purpose for taking part of a person's property, that person's Fifth Amendment right not to have his property taken except for a public use is forfeited with respect to some other part of his property or interest therein.

Nor did *Berman* decide that property may be taken to give the public agency the opportunity to resell it for a

profit, that property may be condemned in order to fulfill a threat which was made in order to coerce the property owner to donate some lesser inteerst, or that a property owner's allegation that the taking was for either of these purposes does not raise a justiciable issue. All that *Berman* held to be nonjusticiable was the proper scope of a project which had been determined to be a public use, and, given the scope of the project as so defined, the need of the public agency for the specific property in question. (See 348 U.S. at 36, quoted at Br. Opp. 4.) Since WMATA did not identify any purpose relating to the construction or operation of a transit system that would be served by taking the entire fee, neither that portion of *Berman* nor the Ninth Circuit decision cited at Br. Op. 5 [1] supports the decision below in this case.[2]

2. Respondent's assertion that "the validity of a taking is not defeated because the decision to condemn an entire tract is based in part on economic factors" (Br. Opp. 5) is carefully ambiguous. It states the law accurately if "economic factors" is understood to refer to the costs of the project. This includes so structuring the taking that the amount of just compensation due is reduced; that was the holding of *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 554 (Br. Opp. 6), which was

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[1] *United States* v. *80.5 Acres of Land, etc.* 448 F.2d 980, 984 (C.A. 9).

[2] Moreover, *Berman* did not involve, and the Court did not decide, the question whether the condemnation court may consider that the taking is not for the purpose asserted by the agency *where the condemnee asserts that the actual purpose of the taking was one forbidden by the Constitution,* as is alleged here. Yet the highly restrictive view of the judicial function adopted below would *a fortiori* require acceptance of the agency's *ipse dixit,* thereby nullifying the condemnee's constitutional defense that the taking was for an invalid purpose. It of course does not follow from such a holding that sham or unsubstantiated allegations by condemnees would prevail; compare, for example, the experience under the abuse-of-process doctrine of *United States* v. *Powell,* 379 U.S. 48, discussed at Pet. 17-18.

followed in *People* v. *Superior Court of Merced County* (cited and quoted at Pet. 18-19), but does not reach this case. On the other hand, if "economic factors" is read more broadly, so as to be germane to petitioners' actual contention—that WMATA (which holds $76.5 million worth of excess property, see Pet. 12, 45a) has taken the entire fee for development or resale at a profit—respondent's proposition finds no support in *TVA* or any other authority. Indeed, the distinction between reduction of cost and attempting to turn a profit is drawn in *Superior Court of Merced County* (see Pet. 19), and in the leading treatise on eminent domain:

> In view of the fact that property may not be taken for the public use and then turned over to private enterprise for non-public purposes, when property is taken for the public use, there cannot at the same time be taken additional adjacent property which it is not intended to devote to the public use, but which is to be sold for profit as soon as the improvement is completed.[3]

The subsection of that treatise which is cited at Br. Opp. 6 actually states that "there is no constitutional requirement that the taking be limited in extent to the present public necessities," and further that "[i]f a taking of the fee is made for a public use, *in good faith and without a wholly unnecessary excess*, it is no ground for opposing the taking that the parties making it intend to derive a private revenue by leasing the land not required for *immediate* occupation."[4] This case, then, is one which the treatise carefully excepts from the category of constitutionally authorized takings; that is, it is one where the taking of the fee was *not* in good faith, and *does* encompass a "wholly unnecessary excess."

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[3] 2A Nichols on Eminent Domain, § 7.223, 3d ed., 1976 (footnote omitted).

[4] *Id.*, § 7.223[2], emphasis added.

3. In order to press this case into the mold of constitutionally permissible takings as set forth in the cited treatise, appellate counsel offer the imaginative but extra-record suggestion that WMATA may have a future need for a fee simple. This is a classic "post-hoc rationalization" (*cf. Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168), having never been advanced by WMATA in three years of negotiations or in support of WMATA's motion to strike the condemnees' defenses and for summary judgment. Both WMATA's presently asserted reasons for taking the entire fee, and the *ipse dixit* that "WMATA did not abuse the process of the Court in seeking to condemn in fee" (Br. Opp. 6), constitute factual allegations which controvert petitioners' substantiated defenses—that the taking was not for any valid purpose but rather to enable WMATA to develop or reconvey the excess proprety for a profit and/or to coerce the donation of the lesser interest which was actually needed. WMATA's felt need to becloud consideration of the Petition by injecting these factual issues into the case betrays a lack of confidence in the legal ground on which petitioners' defenses were rejected below.

4. The constitutional values at stake are readily stated: The Fifth Amendment grants a property owner two rights against the sovereign when it seeks to take his property: (1) he has the right to resist the taking and retain his property unless the taking is for a public use, and (2) the property may not be taken even for a public use except on payment of just compensation. If the decision below stands, the way will be clear for public agencies to coerce the surrender of one or the other of these Fifth Amendment rights, where there is a public need for a part, but only a part, of the owner's property.

Owners who wish to avoid condemnation of the whole will be able to do so only by donating the needed part (or conveying it for whatever the agency offers.) If

they insist on litigating the amount due for the part as just compensation, the agency will condemn the whole. The court will then approve the taking, treating as nonjusticiable the owner's defense that part of the taking is not for public use. (See Pet. 19-20).

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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